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In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, PETITIONER

v.

ALFONSO LOPEZ, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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Respondent and his amici assert three basic challenges to the Gun-Free School Zones Act, 18 U.S.C. 922(q) (Supp. IV 1992). First, they argue that the absence of congressional "findings" renders the Act unconstitutional, or at least precludes its application absent case-specific inquiry into the impact on interstate commerce of a particular violation. Second, they contend that the Act effects an impermissible interference with state prerogatives. Finally, they assert that the Act is not a rational means of pursuing goals that lie within Congress's power under the Commerce Clause. These arguments are without merit.

A. In *United States* v. *Bass*, 404 U.S. 336, 349 (1971), this Court reaffirmed the longstanding interpretive principle that "unless Congress conveys its

purpose clearly, it will not be deemed to have significantly changed the federal-state balance." Relying on *Bass* and other cases articulating similar principles, see Resp. Br. 21-23, respondent argues that the Gun-Free School Zones Act is invalid because "Congress was aware that the Act would tread on traditional and significant areas of state regulation, yet it made no findings on the importance to interstate commerce of such an intrusion." *Id.* at 23.

The decisions upon which respondent relies have no relevance to the present case. This Court has made clear that the "maxim[] of statutory construction" enunciated in *Bass* will "only apply when [the Court is] uncertain about the statute's meaning." *United States* v. *Culbert*, 435 U.S. 371, 379 (1978) (internal quotation marks omitted). The statute at issue in *Bass* provided that a convicted felon "who receives, possesses, or transports in commerce or affecting commerce * * * any firearm" would be guilty of a federal crime. 404 U.S. at 337 (quoting 18 U.S.C. App. 1202(a) (1970)). The Court recognized that "[t]he critical textual question is whether the statutory phrase 'in commerce or affecting commerce' applies to 'possesses' and 'receives' as well as to 'transports.'" 404 U.S. at 339. The other cases cited by respondent, see Resp. Br. 22-23, similarly involve the interpretation of ambiguous statutory texts.[1]

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[1] See *Gregory* v. *Ashcroft*, 501 U.S. 452, 465 (1991) (whether state court judges are "appointee[s] on the policymaking level"); *United States* v. *Enmons*, 410 U.S. 396, 397, 400 (1973) (whether extortion, defined by the statute as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," includes violent acts during labor strike intended to achieve legitimate union objectives); *Rewis* v. *United States*, 401 U.S. 808, 809-812 & n.1 (1971) (whether statutory prohibition on "travel[] in interstate or foreign

The present case, by contrast, does not involve the interpretation of an ambiguous statute. Congress identified with precision the conduct forbidden by the Gun-Free School Zones Act, and respondent's actions clearly fall within the statutory prohibition. Respondent does not deny that he possessed a firearm at a place that he knew to be a school zone, and he does not contend that his conduct was covered by one of the enumerated exceptions to the statutory ban. As in *United States* v. *Culbert*, "here Congress has conveyed its purpose clearly," and the Court should "decline to manufacture ambiguity where none exists." 435 U.S. at 379.

In particular, there is no basis for respondent's contention that the Gun-Free School Zones Act may be deemed ambiguous "because it does not indicate whether Congress intended a case-by-case determination of the activity's connection with interstate commerce." Resp. Br. 18.[2] As this Court has long recognized,

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commerce" in order to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" applies to proprietors of illegal gambling operation whose customers included interstate travelers); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 350-355 & n.1 (1941) (whether Federal Trade Commission's statutory authority to prevent "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" gave it jurisdiction over intrastate sales; Court emphasized (*id.* at 355) that "[t]his case presents the narrow question of what Congress did, not what it could do"); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 481-483 (1940) (whether violent labor strike constituted "restraint of trade or commerce among the several States" within the meaning of the Sherman Act). The decision in *United States* v. *Five Gambling Devices*, 346 U.S. 441 (1953), is discussed at note 3, *infra*.

[2] Respondent also points out, however, that the absence of such an "affecting commerce" element was brought to Congress's attention and that therefore "Congress's omission of any nexus

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

United States v. *Darby*, 312 U.S. 100, 120-121 (1941). Thus, where Congress has defined a class of activity without reference to an "affecting commerce" element, and has determined that all conduct within the class is prohibited, case-by-case inquiry regarding impacts on interstate commerce is inappropriate. See *Perez* v. *United States*, 402 U.S. 146, 152-154 (1971).[3]

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element from § 922(q) cannot be considered a mere oversight." Resp. Br. 14. Respondent does not attempt to reconcile his claim of statutory ambiguity with his assertion that Congress deliberately declined to require that a commerce nexus be proved on a case-by-case basis.

[3] In *United States* v. *Five Gambling Devices*, 346 U.S. 441 (1953), the Court considered the question whether a statutory requirement that manufacturers and dealers must report "all sales and deliveries of gambling devices" applied to transactions involving no movement of goods in, or established effect upon, interstate commerce. Three Justices would have construed the

B. In contending that clear statement principles compel the adoption of congressional findings, respondent implicitly argues that Congress's failure to announce its *reasons* for legislating creates a statutory ambiguity comparable to that which exists when the intended scope of the legislation is unclear. There is no basis for that contention. This Court has recently reaffirmed that "Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review." *Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2471 (1994). See also *FCC* v. *Beach Communications, Inc.*, 113 S. Ct. 2096, 2102 (1993) (noting that the Court "never require[s] a legislature to articulate its reasons for enacting a statute");

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statute to contain such a nexus requirement in order to avoid constitutional difficulties. See *id.* at 442-452 (Jackson, J.). (Respondent relies upon Justice Jackson's analysis, see Resp. Br. 22, albeit without identifying it as a plurality opinion.) Two Justices concluded that the plain language of the statute foreclosed this reading, see *id.* at 452 & n.* (Black, J., concurring), but concurred in the judgment on the ground that the statute was unconstitutionally vague in other respects (*i.e.*, in its reporting requirements). *Id.* at 453-454. The other four Justices also concluded that the statute permitted no case-by-case inquiry into effects on interstate commerce, noting that "[i]t would be difficult for Congress to be more explicit than to direct the statute's mandate, as it has here, to 'every' manufacturer and dealer without qualification." *Id.* at 454 (Clark, J., dissenting). Those Justices would have held that the statute, construed to cover all sales and deliveries, was neither vague nor beyond Congress's commerce power; they would therefore have sustained the convictions. *Id.* at 456-463. Thus, six Justices in *Five Gambling Devices* concluded that a facially unqualified statutory requirement or prohibition cannot be "construed" to require a case-by-case showing of a nexus to interstate commerce, even where such a construction would avoid a substantial constitutional question.

Katzenbach v. *McClung*, 379 U.S. 294, 299 (1964) (noting, in Commerce Clause context, that "no formal findings were made, which of course are not necessary"); cf. *EEOC* v. *Wyoming*, 460 U.S. 226, 243 n.18 (1983). Respondents cite no authority for the proposition that Congress's failure to explain reasons for its decision to enact a statute whose meaning is plain creates a statutory ambiguity to which clear statement principles apply.

Nor is there merit to respondent's related contention that "[f]indings serve the ends of liberty by ensuring that legislation which might upset these carefully balanced structures [of federalism and separation of powers] is enacted only after due consideration." Resp. Br. 28. Procedural rules designed to ensure that all facets of an issue have been considered are central to the review of administrative agency decisions, but they have no application to judicial review of Acts of Congress. In *United States R.R. Retirement Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980), for example, the Court "disagree[d] with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it"; the Court observed that "[t]he language of the statute is clear, and we have historically assumed that Congress intended what it enacted." Moreover, in some instances different Members of Congress may have different reasons for supporting a particular legislative proposal. If a bill achieves passage in both Houses and is signed by the President, there is no constitutional basis upon which a court could strike the law down simply because majorities within the Senate and House of Representatives did not or could not agree upon a particular statement of findings or reasons for its passage. The resulting statutory enactment is no less effective for

constitutional purposes than is a judgment of a court that is not supported by a majority opinion.

C. This Court has, we acknowledge, sometimes used the word "finding" in articulating the standard applicable to Commerce Clause review. See, *e.g.*, *Preseault* v. *ICC*, 494 U.S. 1, 17 (1990) ("We evaluate this claim under the traditional rationality standard of review: we must defer to a congressional finding that a regulated activity affects interstate commerce 'if there is any rational basis for such a finding.'") (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981)). The Court's application of that standard in *Preseault*, however, belies any inference that a formal statement of reasons is required. Neither the statute at issue in *Preseault* nor the accompanying committee reports contained express congressional "findings," nor did the statute or reports refer to the Commerce Clause. See National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48; H.R. Rep. No. 28, 98th Cong., 1st Sess. (1983); S. Rep. No. 1, 98th Cong., 1st Sess. (1983). Based upon its examination of the statute and its legislative history, however, a unanimous Court concluded that "[t]wo congressional purposes are evident," 494 U.S. at 17, and that those purposes bore a constitutionally sufficient relationship to interstate commerce. *Id.* at 17-18. The decision in *Preseault* thus exemplifies (as we argue in our opening brief) that the relevant congressional "finding" can be "merely implicit in the enactment itself." Gov't Br. 17 n.8.

D. Finally, respondent simply ignores the substantial body of prior congressional findings regarding the importance of educational performance to the nation's productivity and economic competitiveness. See Gov't Br. 35-40. The Commerce Clause clearly furnishes an appropriate basis for legislation reasonably designed to

enhance the productivity of American workers and thereby strengthen the country's economic position. Cf. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41-42 (1937). Although the extensive congressional findings cited in our opening brief were made in connection with legislation enacted under the Spending Clause, those findings have repeatedly stressed not simply the importance of educational achievement to the national welfare generally, but its particular significance to the functioning of the national economy. If any judicial assessment of the adequacy of Congress's deliberations were appropriate, the relevant body of evidence would include findings made in connection with earlier legislative enactments, not simply the legislative "record" underlying the Gun-Free School Zones Act itself. Cf. *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring).

II. Respondent and his amici vigorously argue that the Act effects a substantial intrusion on state prerogatives, and particularly on state and local control over primary and secondary education. The basis for this contention is unclear. As we point out in our opening brief, see Gov't Br. 28-29, Congress in crafting the Gun-Free School Zones Act has taken substantial care to respect the policy choices of state and local governments. Thus, individuals acting pursuant to various forms of authorization by state and local officials are exempted from the Act's prohibitions. See 18 U.S.C. 922(q)(1)(B)(ii) and (iv)-(vii) (Supp. IV 1992).[4] In addition,

[4] There is no basis for respondent's assertion that "the Act purports to grant local authorities powers that the states have expressly forbidden them." Resp. Br. 24; see also *id.* at 24-25 n.21. Nor is there any merit to the Pacific Legal Foundation's contention that the Act "requires the States to license firearms."

the Act expressly provides that it shall not be construed to preempt state or local gun-free school zones laws. 18 U.S.C. 922(q)(3) (Supp. IV 1992); see also 18 U.S.C. 927.[5]

Amicus Br. 18 n.6. The Gun-Free School Zones Act does not require state or local officials to do *anything*, nor does it purport to empower them to act in a manner that state law forbids. The statute simply provides that *if* state or local officials authorize (in any of a variety of ways) the possession of firearms within a school zone, the federal prohibition will not apply. Congress's decision to make the applicability of federal law contingent upon the absence of specified actions by state and local authorities is fully consistent with this Court's decisions. Cf. *New York* v. *United States*, 112 S. Ct. 2408, 2424 (1992) ("where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation").

[5] As we acknowledge in our opening brief, see Gov't Br. 29 n.18, Section 922(q) does displace state policy choices to the limited extent of prohibiting conduct that may be permissible under the law of a State. Amici National Conference of State Legislatures, et al., noting that "many States have adopted more expansive interpretations of individual rights under their state constitutions and statutory law than is required by the federal constitution," suggest that the Act thereby effects a constitutionally problematic interference with state prerogatives. Amici Br. 29-30. This argument is without merit. Unquestionably States have broad discretion to determine that individuals within their borders should be given greater protections *against the state government* than the federal Constitution provides. Under the Supremacy Clause, however, the States have no authority to "protect" their residents from the application of federal law.

Respondent points out that state felony charges against him were dismissed after the federal prosecution was commenced. Resp. Br. 2. There is, however, no constitutional bar to successive federal and state prosecutions for the same criminal conduct. See, *e.g.*, *Heath* v. *Alabama*, 474 U.S. 82, 89 (1985); *United States* v. *Wheeler*, 435 U.S. 313, 316-320 (1978). Presumably Texas officials

Nor is there merit to respondent's contention that acceptance of the government's constitutional arguments would permit Congress to regulate all aspects of primary and secondary education. See, *e.g.*, Resp. Br. 46, 46-47 n.42 ("By petitioner's reasoning, school book selection would be a prime candidate for federal control."). Under this Court's decision in *New York* v. *United States*, *supra*, very different constitutional issues would be presented if Congress imposed statutory requirements or prohibitions directly upon state and local educational officials, or if Congress mandated that state and local governments assume responsibility for the enforcement of federal law. See Gov't Br. 27-28. Section 922(q), however, neither impairs the authority of state and local officials to run their schools as they see fit nor enlists them in the Act's enforcement. Indeed, one of the principal virtues of the Gun-Free School Zones Act is that it assists States and localities in the conduct of their educational mission in a manner that does not impinge upon their control over curriculum or educational policy.[6]

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concluded that a Section 922(q) prosecution, conducted by federal officials at federal expense, would adequately serve the State's penal objectives. That choice by state officials is not evidence of federal intrusion on state prerogatives.

[6] It can hardly be disputed that, as a general matter, the presence of firearms is incompatible with the optimal functioning of primary and secondary schools. State and local officials might reasonably determine, however, that in some limited contexts (*e.g.*, a gun safety class) the presence of firearms could serve an educational purpose. Because gun possession "by an individual for use in a program approved by a school in the school zone" is permitted under the Act, see 18 U.S.C. 922(q)(1)(B)(iv) (Supp. IV 1992), the federal statute will not interfere with such choices.

III. Respondent also contends that, even if no congressional findings are necessary, the Gun-Free School Zones Act is invalid because it "regulates non-economic activity without a substantial nexus to interstate commerce." Resp. Br. 37. As we explain in our opening brief, however, violent crime in any setting can be expected to have substantial economic consequences that cannot be confined to a single State. See Gov't Br. 17-18; see also 16 Members of the United States Senate, et al. Amici Br. 12-19. Measures reasonably designed to reduce the incidence of violent crime are therefore well within Congress's power under the Commerce Clause.

In any event, whatever the scope of Congress's power to combat violent crime generally, Congress has unquestioned authority to address threats to the proper functioning of institutions that are of particular concern to the national economy. As our opening brief extensively explains, the government's position in this case is amply supported by two propositions: (a) that a ban on gun possession in primary and secondary schools can be expected to improve the functioning of the educational process, and (b) that the effective operation of primary and secondary schools is likely to have a substantial impact on the health of the national economy. Respondent has wholly failed to demonstrate that either of these propositions is irrational.[7]

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[7] Amici National Conference of State Legislatures, et al., argue that some standard more demanding than rational basis review should apply where the propriety of Congress's ends (as opposed to the suitability of the means it has chosen) is called into question. See Amici Br. 7, 18, 23. Amici cite no authority for this proposition, which is directly contrary to this Court's repeated recognition that "[t]he pertinent inquiry * * * is * * * whether Congress could rationally conclude that the regulated activity

A. Respondent attacks Congress's decision to proscribe the "mere possession" (as distinct from discharge, or possession with intent to use) of firearms in school zones. See Resp. Br. 42-44. Congress could reasonably conclude, however, that gun possession on and around school premises would detrimentally affect the educational process, both by increasing the likelihood of violent incidents and by undermining the efforts of teachers and administrators to create an atmosphere of safety and stability within the school environment. Compare 18 U.S.C. 930 (1988 & Supp. IV 1992) (prohibiting the possession of firearms within a federal facility).[8] Indeed, respondent takes pains to emphasize that possession of a firearm on a school campus is a felony under Texas law, see Resp. Br. 2, 24 n.19, and notes as well that "nearly every state punishes firearm possession on school grounds as a crime." *Id.* at 24.

Respondent also argues that the Act will be ineffective because it cannot be applied (as a result of federal statutes governing criminal prosecution of juveniles) to persons under 18 years of age. See Resp. Br. 45-46 (citing 18 U.S.C. 5032 (1988 & Supp. IV 1992)). It is

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affects interstate commerce." *Hodel* v. *Indiana*, 452 U.S. 314, 324 (1981). Amici's suggestion is, at bottom, no more than a new guise for inviting judicial intrusion into legislative policymaking.

[8] As respondent points out, see Resp. Br. 12 n.5, the statutory ban on firearms possession in federal facilities is based upon the Property Clause. Thus, 18 U.S.C. 930 (1988 & Supp. IV 1992) has no bearing on the question whether the performance of primary and secondary schools can be expected to affect the national economy. Section 930 *is* relevant, however, to the question whether a ban on firearms possession is a rational means of enhancing the effectiveness of an institution whose functions are (for whatever reason) a proper subject of federal concern.

admittedly likely that a sizeable percentage of violations of the Gun-Free School Zones Act will be committed by juveniles. A substantial number of students (such as respondent), however, reach their eighteenth birthday before graduating from high school. Such persons, as well as non-students age 18 or older who violate the Act, remain subject to federal prosecution. See 18 U.S.C. 5031 ("a 'juvenile' is a person who has not attained his eighteenth birthday"). Moreover, federal officials may institute delinquency proceedings against juveniles who violate Section 922(q) if state law does not proscribe the conduct in question or if state authorities decline to prosecute. See 18 U.S.C. 5032(1) (1988 & Supp. IV 1992) (Attorney General may institute delinquency proceedings in federal district court if she certifies that "the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency").[9] The Act thus increases the likelihood that juveniles who possess firearms on or near school grounds will be subject to punishment in *some*

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[9] Section 5032 also provides for federal delinquency proceedings based upon a certification that "the offense charged is a crime of violence that is a felony or an offense described in [one of several enumerated statutory provisions], and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction." 18 U.S.C. 5032(3) (1988 & Supp. IV 1992). The statutory provision establishing penalties for violations of the Gun-Free School Zones Act provides that "for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor," 18 U.S.C. 924(a)(4) (Supp. IV 1992), and Section 922(q) is not one of the specific statutory provisions listed in Section 5032(3). Section 5032(3) therefore does not provide a basis for initiation of federal delinquency proceedings based upon a juvenile's violation of Section 922(q).

forum. The fact that only a subset of the statute's violators will face prosecution in federal court does not render the Act irrational, just as the same consideration does not render irrational numerous other federal criminal prohibitions of conduct that may be committed by either adults or juveniles.

B. Throughout the decade that preceded passage of the Gun-Free School Zones Act, a wide array of political, business, and academic leaders repeatedly stressed the importance of primary and secondary education as a determinant of national economic success. See Gov't Br. 22-25, 35-40. Respondent essentially ignores this evidence, resting on the conclusory assertion that possible deleterious effects on the country's economy "are far too speculative to bear a substantial relation to interstate commerce." Resp. Br. 42. It is well established, however, that "courts must accord substantial deference to the predictive judgments of Congress." *Turner Broadcasting*, 114 S. Ct. at 2471. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, moreover, Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here." *Ibid.* (citations and internal quotation marks omitted). The supposition that deficiencies in primary and secondary education will have substantial long-term economic consequences cannot be deemed irrational simply because those consequences cannot be forecast with mathematical precision.

That the performance of primary and secondary schools is closely linked to long-term economic prosperity is not simply plausible on its face.

Respondent blinks reality in disparaging as "speculative" a proposition that is the subject of broad consensus within the political, business, and academic communities. Respondent and his amici seek to persuade the Court that in passing the Gun-Free School Zones Act Congress has "pushed the envelope"—that the statute may be sustained only if Congress's power under the Commerce Clause is essentially unlimited. Congress's power to pass laws "necessary and proper" for the regulation of interstate commerce is indeed broad, and growing broader: "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power." *New York* v. *United States*, 112 S. Ct. at 2419.[10] But it requires no great creativity to recognize that the safety of the nation's schools can be expected to have substantial long-term impacts on the performance of the national economy. Indeed, if one sought to identify a sphere of activity so devoid of impact upon the national economy as to make it off limits as a subject of federal regulation under the commerce power, it is difficult to imagine a less plausible candidate than primary and secondary education. Whatever the outer reaches of Congress's authority under the Commerce Clause, the Gun-Free School Zones Act is well within constitutional limits.

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[10] In *Preseault*, for example, a unanimous Court concluded that the goal of encouraging the development of additional recreational trails provided a valid basis for legislation under the Commerce Clause. 494 U.S. at 17-18.

For the reasons stated above, and in the opening Brief for the United States, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1994